Filed 1/26/10 Tague v. Anchor Bay Campground CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MICHAEL TAGUE et al., Plaintiffs and Appellants, v. ANCHOR BAY CAMPGROUND, LLC et al., Defendants and Respondents.	A124850 (Contra Costa County Super. Ct. No. C0601998)

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs and appellants, Michael Tague and Michael Matamoros, are members of the Anchor Bay Campground LLC (Anchor Bay), which owns and operates a private campground on the Mendocino Coast. The case originated with a dispute over whether a certain model of trailer—"park model" trailers—would be allowed in the campground. Initially such models were allowed, but after a few were installed, a controversy developed over whether such models were aesthetically appropriate to the campground.

On July 16, 2005, the Anchor Bay board of directors decided that members who had already purchased a park model trailer, or were in the process of purchasing one, would be allowed to have such trailers in the campground, but otherwise there would be a moratorium on "park model" trailers pending a vote by the membership in early 2006. The purpose of the grandfather clause was to avoid losses for members who had already invested in park model trailers. In February 2006, the members voted to make the moratorium permanent.

Plaintiffs allege they were among those permitted to have park model trailers under the board's July 2005 policy. However, Circle J Manufacturers, the maker of Tague's trailer (from whom Matamoros also intended to purchase his trailer) later went out of business. The board decided in February 2006 that plaintiffs could bring park model trailers into the campground only if Circle J once again began manufacturing park models; they could not install park model trailers purchased from a different manufacturer. In October 2006, plaintiffs filed this action against Anchor Bay and several of its directors, alleging breach of fiduciary duty because plaintiffs had become convinced by that time that they would not be allowed to put park model trailers on their lots at the campground, even if manufactured by Circle J.

In April 2007, during the pendency of this action, Anchor Bay, through its directors, adopted a new expulsion policy for members. Rather than requiring specification of a rules violation, plaintiffs claimed the new policy gave the directors unfettered discretion to initiate expulsion proceedings. Plaintiffs amended their complaint on October 18, 2007, alleging that the expulsion policy was "illegal on its face" and "targeted [plaintiffs] for expulsion."

Tensions between the factions at the trailer park escalated when a settlement proposal by plaintiffs was circulated to the Anchor Bay membership in January 2008, with many members petitioning to expel plaintiffs. The board put the expulsion issue to a vote of the membership on February 7, 2008, with the overwhelming majority voting for expulsion. The expulsion notice to plaintiffs indicated the reason for expulsion was that they had previously lied about when they had actually ordered their park model trailers in order to bring themselves under the grandfather clause. In response, plaintiffs filed a separate suit, No. N08-0520, in April 2008, through which they sought to avoid expulsion. On August 21, 2008, an injunction was issued prohibiting plaintiffs' expulsion on the grounds stated in the February 2008 expulsion notice.

In the subsequent trial in the present action, which began on September 23, 2008, the court did not find a breach of fiduciary duty by the directors with respect to their policy regarding the kind of trailers that could be placed on the property, nor did it find

the expulsion policy was "illegal on its face." And while it found Tague was entitled to install a park model trailer manufactured by Circle J in the campground, it did not find plaintiffs were entitled to install such models manufactured by any company other than Circle J.[1]

The court did find, however, that the individual defendants had breached their fiduciary duty to plaintiffs by initiating expulsion proceedings in retaliation for plaintiffs' lawsuit, finding the stated reasons for seeking expulsion of plaintiffs were pretextual. Since plaintiffs had obtained an injunction preventing their expulsion, however, the court found they had not been damaged.

Plaintiffs sought at trial to recover as damages their attorneys' fees in prosecuting the action for injunctive relief. They attempted to bring their case within an exception referred to as the "tort of another" or "third party tort" exception, which allows a court to award attorneys fees as an element of damages where the tort of one party causes another to incur attorneys' fees in litigating against a third party. Defendants argued that plaintiffs were not entitled to avail themselves of that doctrine as a matter of law, and also claimed plaintiffs could not recover attorneys' fees as damages because they failed to plead the tort of another exception or to include a prayer for attorneys' fees.

The court found that plaintiffs were not entitled to recover attorneys' fees as damages because there was no statutory or contractual basis for such fees. (Code Civ. Proc., § 1021.)[2] It reasoned that the "third party tortfeasor" doctrine did not apply

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[1] The court also found Tague was entitled to recover from Anchor Bay any out-of pocket losses he had suffered in reliance on the grandfather clause. Thus, Anchor Bay was required to compensate Tague for his lost deposit and other sums expended in anticipation of installing his park model trailer, reduced by any sums he might recover from Circle J, which he had also successfully sued. Anchor Bay could, instead of paying damages, make an "irrevocable commitment" to allow Tague to bring a park model trailer into the campground, and it could limit that commitment to a trailer manufactured by Circle J. Matamoros, who had incurred no actual expenses toward acquiring a park model trailer, recovered nothing.

[2] Undesignated statutory references are to the Code of Civil Procedure.

because there was "no 'third party.' " It also found plaintiffs failed to properly plead attorneys' fees as damages.

Plaintiffs appealed the judgment against the individual defendants insofar as it denied them attorneys' fees as an element of damages. We affirm.

DISCUSSION

A. Plaintiffs have cited no authority bringing them within the narrow class of cases allowing recovery of attorneys' fees as damages.

"Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation . . . is left to the agreement, express or implied, of the parties." (§ 1021.) Section 1021 is the California version of the "American rule" under which each party must pay its own legal fees. (*Trope v. Katz* (1995) 11 Cal.4th 274, 278-279; *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 321.) Plaintiffs cite no statute and no contractual basis for an award of attorneys' fees in this case.

Rather, plaintiffs claim attorneys' fees, not as an element of costs after judgment, but as an element of damages. It is not entirely clear to us exactly how plaintiffs would define the class of cases in which such damages would be recoverable. To the extent they ask us to endorse a rule allowing recovery of attorneys' fees "as damages" whenever a breach of fiduciary duty is involved, we clearly cannot do so. The general rule is that attorneys' fees are not recoverable as tort damages, even in a successful suit against a defendant who stands in a fiduciary relationship to the plaintiff. (*Pederson v. Kennedy* (1982) 128 Cal.App.3d 976, 978-980.) *Walters v. Marler* (1978) 83 Cal.App.3d 1, 30, once seemed to condone such an exception, but the Supreme Court in *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498 (*Gray*) strongly disapproved that case and that principle: "The fact that the wrongdoing was committed by a fiduciary does not provide a sufficient reason for [an] exception [to the American rule]; surely, if the award of attorney fees depended on the nature of the wrong, fees in tort actions would be awarded on a case-by-case basis, a result clearly prohibited by section 1021." (*Id.* at p. 507.) The Court "decline[d] to open a ' "Pandora's Box" of prolonged

litigation'[citation] by upholding the conclusion in *Walters*[, *supra*, 83 Cal.App.3d 1,] that a plaintiff is entitled to recover attorney fees as an element of damages in actions for fraud in which the defendant is a fiduciary." (*Ibid.*) *Gray* further indicated it would move cautiously before approving any further judicial incursion into the rule of section 1021. (*Id.* at pp. 505-507.)

Indeed, most of the cases cited by plaintiffs deal with a recognized exception to the American rule referred to as the "tort of another" or "third party tort" exception, which allows a court to award attorneys fees as an element of damages where a person "through the tort of another[,] has been required to act in the protection of his interests by bringing or defending an action *against a third person*." (*Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620, italics added (*Prentice*); see also, *Gray, supra*, 35 Cal.3d at p. 505; 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 151, pp. 685-686; 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1656, p. 1173-1175; Pearl, Cal. Attorney Fee Awards (2d ed. 2008) § 9.4, pp. 271-273 (Pearl).)

It is true that, in such cases, attorneys' fees may be awarded as an element of damages. (7 Witkin, Cal. Procedure, *supra*, Judgment, § 151, p. 686.) "The theory of recovery is that the attorney fees are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action." (*Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1310; see Pearl, *supra*, § 9.5, pp. 273-274.)

Ordinarily, however, the "third party tort" or "tort of another" doctrine applies only, as the name suggests, when there are three parties involved in litigation. Although plaintiffs argue that the presence of a third party in these cases is simply a matter of happenstance and not integral to the theory of recovery, the cases strongly suggest otherwise.[3] The Supreme Court recited the rule with specific reference to third parties in

[3] Justice Lucas, dissenting in *Brandt v. Superior Court* (1985) 37 Cal.3d 813 (*Brandt*), identified the "presence of the third party" as crucial to the third party tortfeasor rule. "It is one thing for a tortfeasor to force the victim to sue him; in such a case the victim must bear his own attorney fees. But it is quite another thing for the tortfeasor to inject the victim into litigation with another person." (*Id.* at p. 822 (dis. opn. of Lucas, J.).) This evidently explains why the recovery of attorneys' fees as damages

Prentice, holding that section 1021 is "not applicable to cases where a defendant has wrongfully made it necessary for a plaintiff to sue *a third person*." (*Prentice, supra,* 59 Cal.2d at p. 621, italics added.) It further made clear that section 1021 "undoubtedly prohibits the allowance of attorney fees against a defendant in an ordinary two-party lawsuit."[4] (*Id*. at p. 620-621.) Or, as confirmed more recently, "[t]he tort of another doctrine does not allow a party to recover the fees and costs involved in litigating directly with a negligent defendant." (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 80, opn. mod. 178 Cal.App.4th 1019a.) Indeed, *Gray* itself contrasted the inability to recover attorneys' fees in an ordinary two-party breach of fiduciary duty case with the more limited third party tortfeasor rule. (*Gray, supra,* 35 Cal.3d at pp. 505-509.)

We dealt with a similar issue in *Vanguard Recording Society, Inc. v. Fantasy Records, Inc.* (1972) 24 Cal.App.3d 410, where Vanguard, which had an exclusive recording contract with singer Joan Baez, sued Fantasy Records for producing and distributing an unauthorized recording of an early performance by her. (*Id*. at p. 413.) In addition to obtaining injunctive relief against Fantasy, plaintiffs were allowed to recover attorneys' fees incurred in obtaining injunctive relief against third parties involved in the distribution of the unauthorized recording, but they were not allowed attorneys' fees incurred in litigating against Fantasy itself. (*Id*. at pp. 414, 419-421.) Our opinion in that case strongly undercuts plaintiffs' arguments in this one.

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historically has been limited to cases involving third party litigation. Although he disagreed with the majority as to whether this theory should be expanded in the bad faith insurance context, neither he nor the majority gave any indication that a "second party tortfeasor" rule should be adopted outside that context.

[4] The presence of multiple tortfeasors does not result in the recovery of attorneys' fees. "The rule of *Prentice* was not intended to apply to one of several joint tortfeasors in order to justify additional attorney fee damages. If that were the rule there is no reason why it could not be applied in every multiple tortfeasor case with the plaintiff simply choosing the one with the deepest pocket as the '*Prentice* target.' Such a result would be a total emasculation of Code of Civil Procedure section 1021 in tort cases." (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 57.)

Nor does the existence of multiple lawsuits between the same parties alter the outcome.[5] *Golden West Baseball Company v. Talley* (1991) 232 Cal.App.3d 1294 (*Golden West*) held that recovery of attorneys' fees under the "tort of another" doctrine was not allowed where there was no litigation against a "third party." In that case, the plaintiff baseball club initially sued a city in a contract dispute over what use could be made of the parking lot at Anaheim Stadium. (*Id*. at pp. 1298-1299.) Golden West later sued the city manager in a separate action, alleging he had misrepresented certain facts to it while negotiating with a football team about possible alternative uses of the parking lot. (*Id*. at p. 1297.) Golden West claimed the city manager's misrepresentations necessitated its lawsuit against the city, and therefore the third party tortfeasor doctrine applied. (*Id.* at p. 1302.) But the court held that attorneys' fees were not recoverable because the city manager was acting as a representative of the city, and therefore the suit against the city could not be considered one against a "third party" for purposes of recovering attorneys' fees. (*Ibid*.)

The court in *Golden West* cited not only the Supreme Court's advice that courts should "move cautiously" in this area, but also noted "the practical ramifications which would ensue were we to hold otherwise. If Golden West were allowed to maintain this lawsuit, a second lawsuit would inevitably follow every successful action against an employer. Discovery and trial would identify the employees responsible for tortious conduct, and they in turn would become defendants in a second suit to recover the attorneys' fees expended in the first. . . . We agree with the trial court that, in attempting to invoke the 'tort of another' doctrine, Golden West is merely trying to circumvent the American Rule. We decline to expand the doctrine in such a fashion." (*Golden West, supra,* 232 Cal.App.3d at pp. 1302-1303.) The same observations apply here.

Plaintiffs also emphasize that, by seeking injunctive relief, they were attempting to avert irreparable harm, and thus to mitigate damages. Perhaps, then, their position may

[5] Defendants questioned why plaintiffs had filed a separate action for injunctive relief, rather than requesting such relief in the pending action.

be more precisely summarized as advocating the recovery of attorneys' fees as damages whenever a party seeks to "mitigate" damages through an action for injunctive relief, if that action is necessitated by a breach of fiduciary duty. Not only do they fail to adequately define the scope of the rule they ask us to adopt, but they do not define any limits to their theory so as to avoid an evisceration of the American rule. Whatever the exact scope of their proposed exception, plaintiffs cite no case adopting so broad a rule, nor have they given us a clear rationale for abandoning the American rule in such circumstances.

Plaintiffs liken their case to *Brandt v. Superior Court, supra,* 37 Cal.3d 813, 815, in which the Supreme Court allowed an insured to recover attorneys' fees from his insurer, where the insurer acted in bad faith in denying policy benefits. The court held the insured could recover, as an element of damages, the attorneys' fees he incurred litigating the breach of contract issue, even though it was raised in the same action for breach of the covenant of good faith and fair dealing. (*Id.* at pp. 817-820; see also Pearl, *supra,* § 9.6, pp. 274-276.)

To suggest, however, that *Brandt* authorized the wholesale adoption of a "second party tortfeasor" exception to section 1021 is to misconstrue the case. Although the *Brandt* majority analogized to the third party tortfeasor cases, they gave no indication of an intention to expand that doctrine to cover ordinary two-party disputes outside the bad faith insurance context, and plaintiffs cite no case extending *Brandt* outside that context. Although it was decided pre-*Brandt*, the Supreme Court in *Gray, supra,* 35 Cal.3d 498, acknowledged several Court of Appeal opinions allowing attorneys' fees in insurance cases similar to *Brandt*, noting they should not be expanded "to a noninsurance context." (*Gray, supra,* 35 Cal.3d at p. 507, fn. 5.) Thus, the position advocated by plaintiffs was hypothesized and rejected before *Brandt* was even decided. This is a powerful indication that the holding of *Brandt* should not be extended to other contexts in the absence of a compelling reason. Plaintiffs present us with no such compelling reason.

Indeed, an expansion of *Brandt* was rejected, even where the party allegedly in breach of a fiduciary duty was the plaintiff's attorney. *Schneider v. Friedman, Collard,*

Poswall & Virga (1991) 232 Cal.App.3d 1276, 1280-1285 (*Schneider*) described *Brandt* as a "very narrow 'second party tort' exception . . . which by analogy could serve as a basis for allowing clients to recover attorney's fees incurred in litigation against unscrupulous lawyers." (*Id*. at p. 1282.) *Schneider* acknowledged it would "require but a short extension" of *Brandt* to allow a lawyer's client to recover attorneys' fees where the lawyer forced a client to litigate a fee dispute by adopting a position in bad faith. (*Id*. at p. 1283.) Nevertheless, *Schneider* avoided expanding *Brandt* in that fashion, noting that no other case had done so, and that the Supreme Court had admonished courts " 'to move[] cautiously in expanding the nonstatutory bases' " for attorneys' fees. (*Id*. at p. 1284.) *Schneider* concluded that it "should not create a 'lawyer-trustee' exception on [its] own. If such an expansion of current principles is to take place, it should be announced by the Supreme Court." (*Id*. at p. 1284.) (See also *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 539, fn. 4 [noting the *Brandt* rule is "confined to the special insurer-insured relationship," and declining to extend it to bad faith denial of a contract]; *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 426 [availability of damages under *Brandt* must be "limited to [its] factual setting" in the insurance context], disapproved on other grounds in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219.)

We, too, decline to enter such uncharted waters. This case is a run-of-the-mill dispute in which the parties must bear their own attorneys' fees. It does not fall within any of the narrow categories of cases in which attorneys' fees may be recovered as damages. (Pearl, *supra*, § 9.2, pp. 268-270; 7 Witkin, Cal. Procedure, *supra*, Judgment, §§ 151-155, pp. 685-695.)

B. Plaintiffs' failure to plead entitlement to attorneys' fees provides another reason for affirming the judgment.

As with other damages, if attorneys' fees are to be recovered as damages, they must be pleaded and proved. (Pearl, *supra*, §§ 9.1, 9.7, pp. 267-268, 276; see also *Hsu v. Abbara* (1995) 9 Cal.4th 863, 869, fn. 4.) There was no request for recovery of attorneys' fees in plaintiffs' first amended complaint. The first amended complaint contained allegations about the illegality of the expulsion policy.[6] It did not, however, claim attorneys' fees as damages, but merely asked for a declaration that the expulsion policy was "illegal on its face." Such a pleading does not, as plaintiffs suggest, satisfy the burden of pleading attorneys' fees as an element of damages.

Plaintiffs attempt to excuse this pleading deficiency by arguing that the first amended complaint was filed in October 2007, whereas the expulsion proceedings were not instituted until February 2008, and the suit for injunctive relief not filed until April 2008. Thus, they argue, they could not have claimed attorneys' fees at the time they filed the first amended complaint because such fees had not yet been incurred.

The fact that attorneys' fees had not yet been incurred when the amended complaint was filed does not explain why plaintiffs did not seek to file a second amended complaint alleging this element of "damages" after they filed their petition for injunctive relief. The petition was filed some five months prior to trial in this case, and the injunction was actually granted more than a month before the trial began. Thus, we see no reason to overlook the omission of this element of "damages" from the pleading.

It is true, as plaintiffs point out, that the attorneys' fees issue was raised at the outset of the trial, and it was briefed and discussed during trial and in post-trial briefing. And plaintiffs imply that the court should have granted them leave to amend the pleading to conform to proof, but they have pointed to no such request in the trial court. We see no reason to excuse the failure to plead attorneys' fees as damages in advance of trial, where discovery had already closed before the issue was raised. That failure is yet

[6] The facial validity of the expulsion policy was ultimately upheld by the court.

another reason to affirm the judgment of the court below denying plaintiffs recovery of their attorneys' fees attributable to the action for injunctive relief.

DISPOSITION

The judgment is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.